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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

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11 BERIHU HADERA FKADU,
12 Booking #1551332,

13 Plaintiff,

14 vs.

15 SAN DIEGO COUNTY, et al.,

16 Defendants.

17 Civil No. 07-2116 JM (CAB)

18
19 **ORDER DENYING MOTION TO
PROCEED IN FORMA PAUPERIS
AS BARRED BY 28 U.S.C. §
1915(g) AND DISMISSING CIVIL
ACTION WITHOUT PREJUDICE
FOR FAILURE TO PAY CIVIL
FILING FEES MANDATED BY
28 U.S.C. § 1914(a)**

20 [Doc. No. 2]

21 Plaintiff, currently committed at Patton State Hospital (“PSH”) in Patton,
22 California, and proceeding pro se, has filed a civil rights Complaint pursuant to 42 U.S.C.
23 § 1983. Although difficult to decipher, Plaintiff’s Complaint alleges that San Diego
24 County Sheriff Deputies “over medicated” him while he was incarcerated at George
25 Bailey Detention Facility in 1995. (Compl. at 2-3.) Plaintiff seeks several million dollars
26 in compensatory and punitive damages. (*Id.* at 7.)

1 Plaintiff has not prepaid the \$350 filing fee mandated by 28 U.S.C. § 1914(a) to
 2 commence a civil action; instead, he has filed a Motion to Proceed *In Forma Pauperis*
 3 (“IFP”) pursuant to 28 U.S.C. § 1915(a) [Doc. No. 2].

4 **I. Motion to Proceed IFP**

5 Section 1915 of Title 28 of the United States Code allows certain litigants to
 6 pursue civil litigation IFP, that is, without the full prepayment of fees or costs. 28 U.S.C.
 7 § 1915(a)(2). However, the Prison Litigation Reform Act (“PLRA”) amended section
 8 1915 to preclude the privilege to proceed IFP:

9 . . . if the prisoner has, on 3 or more prior occasions, while
 10 incarcerated or detained in any facility, brought an action or
 11 appeal in a court of the United States that was dismissed on the
 12 grounds that it is frivolous, malicious, or fails to state a claim
 13 upon which relief can be granted, unless the prisoner is under
 14 imminent danger of serious physical injury.

15 28 U.S.C. § 1915(g). “This subdivision is commonly known as the ‘three strikes’
 16 provision.” *Andrews v. King*, 398 F.3d 1113, 1116 n.1 (9th Cir. 2005). “Pursuant to §
 17 1915(g), a prisoner with three strikes or more cannot proceed IFP.” *Id.* The objective of
 18 the PLRA is to further “the congressional goal of reducing frivolous prisoner litigation
 19 in federal court.” *Tierney v. Kupers*, 128 F.3d 1310, 1312 (9th Cir. 1997).

20 “‘Strikes’ are prior cases or appeals, brought while the plaintiff was a prisoner,
 21 which were dismissed ‘on the ground that [they were] frivolous, malicious, or fail[ed] to
 22 state a claim.’” *Andrews*, 398 F.3d at 1116 n.1. Thus, once a prisoner has accumulated
 23 three strikes, he is prohibited by section 1915(g) from pursuing any other action IFP in
 24 federal court unless he is in “imminent danger of serious physical injury.” *See* 28 U.S.C.
 25 § 1915(g).¹

26

 27 ¹ The Ninth Circuit has held that section 1915(g) does not violate a prisoner’s right to access
 28 to the courts, due process or equal protection; nor does it violate separation of powers principles or
 operate as an ex post facto law. *Rodriguez v. Cook*, 169 F.3d 1176, 1179-82 (9th Cir. 1999); *see also*
Andrews, 398 F.3d at 1123 (noting constitutionality of § 1915(g), but recognizing that “serious
 constitutional concerns would arise if § 1915(g) were applied to preclude those prisoners who had filed
 actions who were not ‘frivolous, malicious, or fail[ing] to state a claim’ from proceeding IFP.”).

1 While the PLRA does not require a prisoner to declare that § 1915(g) does not bar
 2 his request to proceed IFP, *Andrews*, 398 F.3d at 1119, “[i]n some instances, the district
 3 court docket records may be sufficient to show that a prior dismissal satisfies at least one
 4 of the criteria under § 1915(g) and therefore counts as a strike.” *Id.* at 1120. When
 5 applying 28 U.S.C. § 1915(g), however, the court must “conduct a careful evaluation of
 6 the order dismissing an action, and other relevant information,” before determining that
 7 the action “was dismissed because it was frivolous, malicious or failed to state a claim,”
 8 since “not all unsuccessful cases qualify as a strike under § 1915(g).” *Id.* at 1121. The
 9 Seventh Circuit likewise requires the district court to cite the specific case names,
 10 numbers, districts and dates of dismissal for each civil action it has determined to be a
 11 “strike” or “prior occasion.” *Id.* at 1120 (citing *Evans v. Illinois Dep’t of Corrections*,
 12 150 F.3d 810, 811-12 (7th Cir. 1998)).

13 The Ninth Circuit has held that “the phrase ‘fails to state a claim on which relief
 14 may be granted,’ as used elsewhere in § 1915, ‘parallels the language of Federal Rule of
 15 Civil Procedure 12(b)(6).’” *Id.* at 1121 (quoting *Barren v. Harrington*, 152 F.3d 1193,
 16 1194 (9th Cir. 1998)). *Andrews* further holds that a case is “frivolous” for purposes of
 17 § 1915(g) “if it is of little weight or importance” or “ha[s] no basis in law or fact.” 398
 18 F.3d at 1121 (citations omitted); *see also*
 19 *Neitzke v. Williams*, 490 U.S. 319, 325 (1989) (“[A] complaint, containing as it does both
 20 factual allegations and legal conclusions, is frivolous [under 28 U.S.C. § 1915] where it
 21 lacks an arguable basis in either law or in fact [The] term ‘frivolous,’ when applied
 22 to a complaint, embraces not only the inarguable legal conclusion, but also the fanciful
 23 factual allegation.”). “A
 24 case is malicious if it was filed with the intention or desire to harm another.” *Andrews*,
 25 398 F.3d at 1121 (quotation and citation omitted).

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1 **II. Application of 28 U.S.C. § 1915(g)**

2 The Court notes as an initial matter that Plaintiff has alleged no facts to show that
 3 he is in imminent danger of serious physical injury. *See* 28 U.S.C. § 1915(g); *Rodriguez*,
 4 169 F.3d at 1178; *see also* *Ashley v. Dilworth*, 147 F.3d 715, 717 (8th Cir. 1998) (finding
 5 that “allegations that the prisoner faced imminent danger in the past” are insufficient to
 6 trigger section 1915(g)’s imminent and serious physical injury exception). Thus,
 7 regardless of Plaintiff’s financial status, he may not proceed IFP pursuant to 28 U.S.C.
 8 § 1915 if he has, on three prior occasions while incarcerated, had federal civil actions or
 9 appeals dismissed as frivolous or malicious or for failing to state a claim. *See* 28 U.S.C.
 10 § 1915(g); *Andrews*, 398 F.3d at 1119-20; *Rodriguez*, 169 F.3d at 1178.

11 A court “may take notice of proceedings in other courts, both within and without
 12 the federal judicial system, if those proceedings have a direct relation to matters at issue.”
 13 *United States ex rel. Robinson Rancheria Citizens Council v. Borneo, Inc.*, 971 F.2d 244,
 14 248 (9th Cir. 1992). Here, the Court takes judicial notice that Plaintiff has had three prior
 15 prisoner civil actions dismissed in both the Southern and Central Districts of California
 16 on the grounds that they were frivolous, malicious, or failed to state a claim upon which
 17 relief may be granted pursuant to 28 U.S.C. § 1915(e)(2) and § 1915A. *See Dekadu v.*
 18 *State of California*, S.D. Cal. Civil Case No. 04-2065 WQH (POR) (Jan. 4, 2005 Order
 19 Denying IFP and Dismissing Complaint sua sponte as frivolous per 28 U.S.C. §
 20 1915A(b)(1) [Doc. No. 3]) (strike one); *Fekadu v. Cal. Dept. of Corrections*, S.D. Cal.
 21 Civil Case No. 04-2173 JM (NLS) (Jan. 3, 2005 Order Denying IFP and Dismissing
 22 Complaint sua sponte as frivolous per 28 U.S.C. § 1915A(b)(1) [Doc. No. 6]) (strike
 23 two); and *Fkadu v. Luna*, C.D. Cal. Civil Case No. 06-0323 AMS (SH) (Feb. 13, 2006
 24 Order Denying IFP and Dismissing Complaint as legally and/or factually patently
 25 frivolous [Doc. No. 2]) (strike three).

26 Accordingly, because Plaintiff has, while incarcerated, accumulated three “strikes”
 27 pursuant to § 1915(g), and does not presently allege facts sufficient to show that he is
 28 under imminent danger of serious physical injury, the Court **DENIES** Plaintiff’s Motion

1 to Proceed IFP [Doc. No. 2]. *See Andrews*, 398 F.3d at 1121; *Rodriguez*, 167 F.3d at
2 1178.

3 **III. Conclusion and Order**

4 For the reasons set forth above, the Court hereby **DENIES** Plaintiff's Motion to
5 Proceed IFP pursuant to 28 U.S.C. § 1915(g) [Doc. No. 2] and **DISMISSES** the case
6 without prejudice for failure to pay the full \$250 civil filing fee required by 28 U.S.C. §
7 1914(a).

8 The Clerk shall close the file.

9 **IT IS SO ORDERED.**

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11 DATED: November 15, 2007


12 Hon. Jeffrey T. Miller
13 United States District Judge

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